Copyright, Work For Hire And Right to Work

What You Get

What You Can Give

A review of the basics and fundamental things to think about

Work for Hire
the Basics

- Applies only to copyright -is not an assignment of rights - work vests directly
- Written agreement preferable to trying to prove work for hire
- Useful in
  - Employment Agreements
  - Consulting Agreements

Copyright & Infringement

- Fixed in a Tangible Medium of Expression
- Establishing Ownership
  - Work for Hire, Assignment or other transfer
- Access and Substantial Similarity
- Infringing Oneself
  - consider Fantasy, Inc v Fogerty 654 F Supp 1129 (N. D. Cal 1987)

De Minimus and Substantial Similarity

- Law does not concern itself with trifles - Consider Learned Hand opinion Newton v Diamond 388 F 3d 1193
- Small sections may not be trifles or “de minimus” consider the very short musical phrase in He’s So Fine and the infringing My Sweet Lord. Bright Tunes Music Corp.v Harrisongs Music Ltd 420 Supp177

Modern Software

- Is a collection of procedures, functions, subroutines, objects that are passed and return values.
- These are put together in creative ways but they are the basic building blocks. Some languages allow you to create new ones within the program - using other procedures, functions, subroutines and objects.

Creativity in procedures

- Quoting SAS Institute 605 F Supp 825
  - Beginning with a broad and general statement of the overall purpose of the program, the author must decide how to break the assigned task into smaller tasks, each of which must in turn be broken down into successively smaller and more detailed tasks. At the lowest levels the detailed tasks are then programmed in source code. At every level, the process is characterized by choice, often made arbitrarily and only occasionally by necessity.
  - Ignores the generalization and optimization process in creating general case tools and structures (procedures, functions, objects)

Modern Software

- Optimization and debugging will lead toward substantially similar/identical code in these procedures, functions, subroutines and objects even if an electronic copy is not made.
- Whelan Associates v Jaslow Dental Laboratory 797 F 2nd 1222 rejected the notion that “stepping stones” of code are required for software development as an industry.

Optimization and Efficiency

- Efficiency is an industry-wide goal. Since, as we have already noted, there may be only a limited number of efficient implementations for any given program task, it is quite possible that multiple programmers, working independently, will design the identical method employed in the allegedly infringed work. Of course, if this is the case, there is no copyright infringement. *See Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 - quoting from Computer Associates International, Inc. v. Altai, Inc. U.S. Court of Appeals, Second Circuit June 22, 1992 982 F.2d 693

Non Infringement

- In the computer context this means when specific instructions even though previously copyrighted are the only and essential means if accomplishing a given task, their later use by another will not amount to an infringement.
  - National Commission on New Technological Uses of Copyrighted Works Final Report 20 (1979) and adopted 605 F Supp 835 and variously

Modern Software

- Uses these procedures, functions, subroutines and objects because they are valuable - they have been tested, debugged and optimized for speed and AND CAN BE VERY SHORT and most programmers view as complete whole! There are whole “libraries” of these things available for most current languages. (Available under various “licensing” provisions) - google “software development libraries”
- Is it probable that a procedure, function, subroutine or object will be a trifle and not subject to copyright protection?
- Is it probable that a probable that a procedure, function, subroutine or object will be the only or one of a very few limited expressions and therefore not subject to copyright protection?

So you want to hire an experienced Programmer or Consultant?

- You get a work for hire agreement or provision in the employment/consulting agreement.
- You get well structured modularized code using procedures functions subroutines and or objects
- What do you have - what can you give as an IP indemnity if this code is going into a product?

Your Employee/Consultant

- Goes to (or comes from) a competitor
- Takes a disc with a library of procedures, functions, objects that he wrote
- “Rewrites” these procedures, functions, objects but they sure look familiar
  - If they aren’t de minimus and are otherwise the subject of copyright - now what?
  - If they can be used - under what theory?

The Employee/Consultant

- Has by definition access (they wrote it)
- His/her code will be probably substantially similar - if not “de minimus” or one of the few ways to express/implement - then what?
- Has a right to work and benefit from experience and training

Your Employee's Work

- Goes into standard product - can you/should you give an IP indemnity?
- Is as a consultant for your customers
  - can you should you allow this work to be "work for hire"? Do you require a license back to his work. What if the customer demands work for hire and refuses license back?
  - can you/should you give an IP indemnity?

The code produced for the customer is great

- You gave a “work for hire” provision to the work and did not get a license back to the work
- Substantially similar code is put into the next release of the your standard product (your employee now works in product development and contributed this section - The subject code is divided into 7 short procedures/functions subroutines that including documentation and formatting fits on five pages)
- Your Customer is very unhappy - now what?

Now What?

- Argue the optimized routines are one of a few or the only method to express and not subject to copyright - Do you want to compromise your own products' protections?
- Narrow genre "programming language" and employee's right to work?
  - Further narrowed by professional techniques, documentation, training and code optimization
- Settle?

What is de Minimus

- Recent Article Confusion in the Digital Age: Why De Minimus Use Test Should be Applied to Digital Samples of Copyrighted Sound Recordings - Mike Suppaola Texas Intellectual Property Law Journal Vol 14 no 2 at page 93 Spring 2006 - is interesting by analogy

Style and Infringement Swamp Rock

- Fogerty finding of fact was that Fogerty did not infringe (not substantially similar) - that the style “Swamp Rock” was narrow with more overlap allowed than “normal” ... Does this apply to a programmer working in a language?

- Trial Court Holding referred to at 984 F2nd 1524, 1532 and also 510 US 517

- I’d appreciate a cite to actual trial opinion or any other clear holding along these lines - especially computer related

More Information Wanted

- Other cases/information especially software related is sought
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Other Interesting

- Amicus Brief: IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT **UNIVERSAL CITY STUDIOS, INC *v.* ERIC CORLEY, A/K/A EMMANUEL GOLDSTEIN AND 2600 ENTERPRISES , INC. SHAWN C. REIMERDES, ROMAN KAZAN - Really computer code and first amendment but there is a good discussion of style etc. A 2001 brief and can be found at** http://www.cs.cmu.edu/~rwh/misc/dmca-amicus.pdf
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